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ABSTRACT

This document consists of a summary discussion of the relevant sections of the new copyright law--Section 107, fair use, and Section 108, reproduction by libraries and archives--supplementary guidelines for corporate libraries developed by the Association of American Publishers (AAP) and the Authors League, and some of the more frequently asked questions and answers about photocopying. (Author/MBR)

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Photocopying by CORPORATE LIBRARIES

A statement of position with respect to the photocopying of journal articles and other short works by corporate libraries under the new copyright law, and answers to some questions frequently asked.

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
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INTRODUCTION

From time to time, copyright-related questions having to do with photocopying* by corporate libraries** of journal articles and other short works have been asked of us. These same questions have been the subject of debate between and among publishers, authors and librarians.

The Senate and House Reports recognize that neither a statute nor legislative history can specify precisely which library photocopying practices constitute the making of "single copies," as distinguished from "systematic reproduction." Each body therefore recommended that representatives of authors and publishers meet with the library community to formulate comprehensive guidelines. The library associations unfortunately have not been forthcoming in this regard, and therefore the Authors League and the Association of American Publishers have developed this document to assist corporate libraries to comply with the new law. The document consists of a summary discussion of the relevant sections of the new law, supplementary guidelines developed by the AAP and the Authors League, and some of the most frequently asked questions about photocopying and our answers.

We expect in the near future to develop a similar document for academic and public libraries.

As you read what follows, please bear in mind that when we respond to questions about what copying cannot be done under the new law, we are only talking about what cannot be done *without permission or payment*. Through such organizations as the newly formed Copyright Clearance Center, copying that goes beyond the limits permitted by the new law can be done quickly and economically.

The two sections of the new copyright law, Public Law 94-553 (Title 17, U.S. Code) relevant to photocopying are Section 107 ("fair use") and Section 108 ("reproduction by libraries and archives").

Section 107 makes no change in the judicial "fair use" doctrine; it merely codifies it. Section 108 on the other hand, in certain circumstances and under certain conditions, permits libraries to make copies which they could not have made under the "fair use" doctrine and which would not be permissible under Section 107.

*and other kinds of reprographic reproduction, as now commonly practiced.

**we refer to libraries and information centers operated by or associated with for-profit organizations.

SECTION 107

The right of a corporate library to make "fair use" copies of copyrighted articles and other works under Section 107 is closely circumscribed. Section 107 provides that in determining whether in a particular case "fair use" is being made of a copyrighted work, the factors to be considered shall include the purpose and character of the use including whether it is of a "commercial nature"; the nature of the copyrighted work, the amount and substantiality of "the portion" of the copyrighted work that is used "in relation to the copyrighted work as a whole"; and the effect of the use upon the potential market for or the value of the copyrighted work.

Examples of fair use, as stated in the Register's Report and repeated in the Senate and House Reports, convey the limited nature of the doctrine. They are

> the "quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported."

Copying by a corporate library is usually for a "commercial" purpose (it surely is not for a "non-profit" purpose). Most of a corporate library's copying is of a "work as a whole" (an entire article is an entire work). And most of a corporate library's copying of copyrighted articles and other works will affect the potential market for the copyrighted work. (This will be particularly true if hard copies can be purchased from the publisher or from licensed reproducing agencies or if authorized on-the-premises copying is permissible through the Copyright Clearance Center or other similar mechanisms.) It is reasonable to conclude therefore that "fair use" will justify the copying of copyrighted articles and other works by a corporate library only where the copying is infrequent and sporadic, and where the quantity copied is small.

SECTION 108

Section 108, on the other hand, authorizes certain kinds of library photocopying that could not qualify as "fair use," provided, among other things, that such copying is done "without any purpose of direct or indirect commercial advantage." Whether a *corporate* library can be considered to be acting without such a purpose and can therefore take advantage of Section 108 copying exemptions is debatable.

The Senate Report says that Section 108 is intended to "preclude" a library in a profit-making organization from making photocopies unless the copying "qualifies as a fair use" under Section 107 or the organization obtains the necessary copyright licenses. On the other hand, the House and the Conference Reports say that "isolated, spontaneous making of single photocopies" by a corporate library "without any systematic effort to substitute photocopying for subscriptions or purchases" and "without any commercial motivation" would come within the scope of Section 108. Since the Reports are not consistent in this regard, they are of little assistance in determining the meaning of the "commercial advantage" limitation.

Assuming that a corporate library can come within the scope of Section 108, its collections must be open to the public or available not only to those connected with the organization, but also to others including competitors doing research in its specialized field, and the photocopies which it makes must include the appropriate notice of copyright.

Section 108 copying privileges, whether for non-profit or for corporate libraries, are limited to supplying a user under certain conditions with "no more than one copy" of "one article" in a journal issue. While further single copies of that article may be supplied to other users, this may be done only on "isolated and unrelated" occasions.

Section 108 specifically prohibits any library from engaging in the "related or concerted" making of multiple copies of the same material, whether on one occasion or over a period of time. It likewise prohibits the "systematic" making of copies, whether single *or* multiple.*

The House Report makes clear that a library in a profit-making organization would not be authorized, under Section 108, to:

> "(a) use a single subscription or copy to supply its employees with multiple copies of material relevant to their work; or
>
> (b) use a single subscription or copy to supply its employees, on request, with single copies of material relevant to their work, where the arrangement is 'systematic' in the sense of deliberately substituting photocopying for subscription or purchase; or
>
> (c) use 'interlibrary loan' arrangements for obtaining photocopies in such aggregate quantities as to substitute for subscriptions or purchase of material needed by employees in their work."

Moreover, it says, a library in a profit-making organization "could not evade these obligations by installing reproducing equipment on its premises for unsupervised use by the organization's staff."

For all of the reasons developed in the foregoing paragraphs, it seems reasonable to state that exempt copying by for-profit organizations will be narrowly confined.

*The Senate Report, at pages 70-71, gives specific examples of prohibited reproduction of multiple copies and of systematic copying.

NUMERICAL GUIDANCES

There are inherent limits to the amount of copying that may be done either through interlibrary arrangements or by a library itself for its own users, and Congress has urged the interested parties to establish specific numerical limits through the development of mutually acceptable guidelines.

Some guidelines for certain kinds of interlibrary copying have been agreed to under the aegis of the National Commission on New Technological Uses of Copyrighted Works (CONTU). These establish the so-called "rule of five" for interlibrary arrangements for articles not more than five years old (namely, that not more than five requests in the aggregate may be made in any calendar year for copies of an article or articles published in any particular journal within five years from the date of the request).* Thus, in any calendar year, requests by one library from others may be filled for one copy of each of five different articles published in *PHYSICS TODAY* during the past five years, or five copies of one of such articles, or three of one and two of another, so long as the *total* number of copies of articles from this periodical requested during the calendar year does not exceed five.

But CONTU guidelines do not specify limits on the copying of journal articles more than five years old, leaving that for "future interpretation." Neither are there any agreed guidelines for copying that a library may do for its own users, or for copying on unsupervised copying equipment located on corporate library premises, or for copying by multiple libraries that serve and are operated by the same company.

To fill these gaps and to provide some guidance we would be willing, provisionally, and subject to review from time to time, and without prejudice to our position in future negotiations or litigation, to accept the following as compliance with the new law:

1. *Copies requested by one library from other libraries.*

a) For journal articles less than five years old, we accept the CONTU "rule of five," subject to the conditions stated in the guidelines.

b) Subject to the conditions stated in those guidelines, not more than five copies may be made per year, in the aggregate for all of its users, of an article or articles published in the journal more than five years prior to the date of the request. Thus, a library may obtain from other libraries in any calendar year, five copies in the aggregate of one or more articles published in that journal during the previous five years and, *in addition*, five copies in the aggregate of one or more articles published in that journal prior to that five year period.

2. *Copies made by a library for its own users from a journal in its own possession.* A library in any calendar year may make, in the

*The rule is stricter for contributions to other kinds of collective works, such as an anthology. No more than five copies in the aggregate may be made in any calendar year from any such work regardless of its age, so long as it is in copyright.

aggregate for all of its users, not more than two copies of one article *or* one copy each of two articles appearing in any given periodical issue.

3. *Unsupervised use of copying equipment located on the library premises.* The new law provides no exemption to a corporate library with respect to the unsupervised use of copying equipment on its premises. The corporate library's obligation is therefore to ensure that no prohibited copying is done on its premises, or to make appropriate license arrangements with the relevant copyright owners.

4. *Multiple libraries operated by the same company.* If multiple libraries are operated by and serve a single company, their copying must be aggregated to determine whether such copying exceeds permissible limits. This is true both for interlibrary arrangements and for copying done for the company's own employees.

Questions and Answers Relating to Photocopying by Corporate Libraries

1. **Q.** If an organization has a license or other form of permission to make photocopies for its employees from journals or access services, does it need to pay for this copying in any other manner?
   A. No. The conditions of the license or other permission govern such uses. (If they are not broad enough, additional rights should be sought through negotiations.)

2. **Q.** Is there any difference if the requests that lead to this copying come from the use of other services, such as computer searching?
   A. No.

3. **Q.** Can multiple copies of a copyrighted article be made without express permission?
   A. No, except when the copying is reported and paid for through the Copyright Clearance Center or other clearance or royalty mechanisms.

4. **Q.** Will the collections of a corporate library be considered to be "open to the public, or available . . . to other persons doing research in a specialized field" (as required by Section 108) if would-be outside users must make appointments for such use; or if, having been permitted to conduct their research, they are excluded from nearby proprietary material?
   A. Probably "yes," in each case.

5. **Q.** Would such collections qualify under Section 108 if employees of competitors are denied access?
   A. No.

6. **Q.** Would such collections qualify under Section 108 if the would-be users are not granted physical access, but if photocopies of articles in the collection are provided on request through inter-library transactions?
   A. Probably not.

7. **Q.** May a library that is eligible for Section 108 privileges supply single copies of an article from a periodical to an unlimited number of individuals?
   A. No. Section 108(d) permits the library to supply to a requesting user no more than one article from a given periodical issue. Section 108(g) limits this permission to "the *isolated* and *unre-*

lated" reproduction of a single copy of the same material on separate occasions. The section prohibits the "related or concerted" copying of the same material on one occasion or over a period of time; it also prohibits "systematic" copying, whether of multiple or single copies.

8. **Q.** May such a library supply a requesting user with a copy of each paper printed in a symposium issue?
   A. No.

9. **Q.** Is it possible to quantify the number of times a corporate library may copy an article from a specific periodical under the "fair use" doctrine of Section 107?
   A. Yes, it would be possible, if quantitative limits were established by guidelines negotiated among the interested parties. Publisher and author associations desire to negotiate them, but the Council of National Library Associations is "not sympathetic" to participation in any such discussions now.

10. **Q.** Is it possible to quantify the number of times a corporate library may copy an article from a specific periodical under Section 108?
    A. Yes, it would be. See the answer to the previous question, and see pages 6-7 under NUMERICAL GUIDANCES.

11. **Q.** Is an organization that buys more than one subscription to a periodical entitled to use the number of its subscriptions as a multiplier of the number of copies it may make under the guidelines or guidances?
    A. Yes. If, for example, a library has two subscriptions to a journal, it may make, in any calendar year, in the aggregate, not more than four copies of one article or two copies each of two articles appearing in an issue of that journal (cf. pages 6-7).

12. **Q.** Is it true that most library photocopying can be justified—is best justified—under the "fair use" doctrine of Section 107, and that Section 108 chiefly provides clarifications that were developed to allay unjustified library fears?
    A. No. General reliance on the concept that Section 107 permits large-scale copying would place libraries in violation of the law. Section 108 gives library copying privileges not available under Section 107, and there is no refuge in Section 107 from the clear limits on these privileges set forth in Section 108.

13. **Q.** Is a library permitted to make additional photocopies of a journal article for a user under Section 107 ("fair use") after it has exhausted its right to do so under Section 108(d)?
    A. Clearly not. The legislative reports stress that Section 108 authorizes certain *additional* photocopying practices which do not

qualify as "fair use" under Section 107. Thus Section 108 amplifies and supplements Section 107. To attempt to argue the reverse is to stand the law on its head.

14. **Q.** Can it be considered a request by a user for "no more than one copy" (as the term is used in Section 108) if a library, in response to the user's subject request, supplies the user with a copy of each article on or related to that subject, that thereafter comes to its attention?
    A. No, the supply of copies in such a manner would be neither "isolated" nor "unrelated"; hence, it would not be permissible under Section 108. On the contrary, it would be specifically prohibited as "systematic."

15. **Q.** If a library supplies a single photocopy of an article to an individual, at his request, in isolated and unrelated instances pursuant to the individual's own identification of articles through his own computer search, are such requests any different legally from other requests for photocopies he may make?
    A. No; how the individual identifies references for himself would not seem to be germane.

16. **Q.** What if the computer search were conducted for the individual by the library, and were based on his request that the library send him a photocopy of each article identified by the search?
    A. Clearly, this service would constitute "systematic" copying, prohibited by Section 108(g).

17. **Q.** Is it permissible to make a photocopy from a copy of an article if the first copy were legally prepared or obtained?
    A. Permission or payment would usually be required for such additional copying.

18. **Q.** What if the copyright notice does not appear on the first generation copy?
    A. A serious effort should then be made to identify the source of the article and seek the requisite permission.

19. **Q.** Is a company exempt from copyright restrictions if it provides multiple copies of articles (including those by company authors) to comply with federal or other governmental requests?
    A. Usually not. It is assumed that the company will be able to obtain permission from the publisher, or to report and to pay for any necessary multiple copying through the Copyright Clearance Center or other clearance or royalty mechanisms.

20. **Q.** If an article has been written by a company employee with company approval, may the company or its employee-author

photocopy the article for internal use, without specific publisher permission? What is the situation when reprints are not at hand? May such articles be reproduced for product-promotion distribution?

A. The answers to all three questions depend on the nature of the agreement between the publisher and the company or its employee-author.

21. **Q.** Are non-U.S. publishers covered under the new law?
A. Yes, in almost all instances.

22. **Q.** May a library lawfully obtain photocopies from service organizations such as the British Library Lending Division?
A. Only if the supplying service is licensed to provide the copies, or if it or the requesting library will report and pay for the photocopies through the Copyright Clearance Center or other recognized clearance or royalty mechanisms.

23. **Q.** What restrictions, if any, are there on the copying of bibliographical references appearing as footnotes to or at the end of an article?
A. Each reference, as such, is in the public domain and is not subject to copyright. However, copyright may exist in the compilation of the references. Hence copying of compilations of such references will usually require permission.

24. **Q.** May a company (or its library) copy the tables of contents from periodical issues and distribute them to company employees without permission from the publisher?
A. No, this would require permission of the publisher.

25. **Q.** May a company copy the "author abstracts" that are part of periodical articles? May it collect these abstracts into bulletins that it sends to its employees to alert them to new information?
A. No, to both questions. Because an abstract contains the core or essence of the article, copying it can be likened to the copying of the whole of the article. The copying of abstracts without permission is not "fair use."

26. **Q.** May a company make multiple copies of abstracts that it has received legitimately through licensed computer searching of access services?
A. Only if the license for such searching includes the right to make such multiple copies, or if reporting and payment can be made through the Copyright Clearance Center or other authorized mechanisms.

27. **Q.** What are the copyright-related consequences of copying of copyrighted material by employees at unattended copying machines?
A. Copying in excess of that permitted by Sections 107 and 108 will constitute infringement for which both the company and the individual will be responsible. We suggest that each company having unattended machines on its premises adopt the following procedures:

(i) Circulate a memorandum to the staff stating the limitations of the "fair use" doctrine.

(ii) Require that copying beyond "fair use" be done by the library staff, either as permitted by Section 108, or as authorized by the copyright proprietor, or through the Copyright Clearance Center or similar mechanisms.

28. **Q.** What notice of copyright must be included on photocopies made by libraries under Section 108?
A. The same notice of copyright that applies to the original work. Section 108(a)(3) requires that the copy include "a notice of copyright." A "notice of copyright," as provided in Section 401, should include the prescribed symbol, word or abbreviation for copyright, the year of first publication, and the name of the owner of the copyright. In order to avoid error, the library should include on the copy the notice of copyright appearing on the copied work.

We *disagree* with the expressed view of the Council of National Library Associations that the following notice is adequate: "This material may be protected by copyright law (Title 17 U.S. Code)." *We believe such a notice is totally inadequate to comply with the requirements of Section 108(a)(3).*

Some Additional Questions and Answers Relating to the Copyright Clearance Center (CCC)

29. **Q.** What is the CCC and when did it commence operation?
A. The CCC is a non-profit corporation organized for the primary purpose of providing publisher permission to copy journal articles and other short works for internal use and to provide a method for centralizing the payment of the publisher-prescribed fees for such copying. It began operation on January 1, 1978. Copying by bibliographic-searching and other similar systems to fill clients' requests can also be authorized through CCC.

30. **Q.** How can one obtain more information about CCC?
    A. By writing to CCC, 310 Madison Avenue, New York, New York 10017. A manual for libraries and other users is available without charge.

31. **Q.** Can copies in excess of those permitted by the CONTU guidelines be obtained through interlibrary arrangements by the use of CCC; and if so, how?
    A. Yes. This can be done if either the requesting library or the supplying library reports the copying to CCC. The Users Manual indicates how the ILL form should be filled out to accomplish the purpose.

32. **Q.** Who is responsible for payment of the copying fee when a copy of an article is supplied by facsimile transmission?
    A. As in the case of the supplying of a copy through interlibrary arrangements, the library that does the copying has the responsibility for seeing that the fee, if required, is paid. However, as between the requesting and the supplying library the cost will be borne as agreed between them.